BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA GUSTIN Claimant	)	
VS.	)	
PAYLESS SHOESOURCE, INC. Respondent	)	Docket No. 1,045,442
AND	)	
AMERICAN ZURICH INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the April 9, 2010, Award and the April 12, 2010, Corrected Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on July 7, 2010. George H. Pearson, III, of Topeka, Kansas, appeared for claimant. James C. Wright, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had a 100 percent wage loss and a 34 percent task loss, which computes to a work disability of 67 percent. The ALJ rejected respondent's argument that just because a doctor recommends certain restrictions does not mean that a claimant has lost the ability to perform a certain task.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent contends claimant did not prove she lost the ability to perform the work tasks she had performed over the 15-year period prior to her work-related accident. Respondent argues that a strict reading of K.S.A. 44-510e(a) requires that claimant must have lost the ability to perform the work task before being compensated for the loss of that

task. Accordingly, respondent requests that the Board modify the Award and find that claimant's work disability be reduced to 50 percent based on a 100 percent wage loss and a 0 percent task loss. Respondent further requests that the Board make a finding concerning claimant's percentage of functional impairment and suggests the Board find it to be 5 percent as opined by Dr. Gilbert.

Claimant argues that she has lost the ability to perform certain work tasks that she had performed in the 15-year period before her work related accident, as was testified to by Drs. Prostic and Gilbert, and asks that the Board affirm the ALJ's Corrected Award. Claimant contends her permanent impairment of function is 12 percent as opined by Dr. Prostic.

The issue for the Board's review is: Did claimant prove she lost the ability to perform certain work tasks she had performed over the 15-year period before her work-related accident?

FINDINGS OF FACT

Claimant worked for 10 years in respondent's Kosan Department where she packed and decased boxes of shoes. On March 2, 2009, however, for the first time, she was sent to the receiving department and told to help unload a trailer. In an attempt to reach the top boxes, she stair stepped some boxes and stood on them. The stair-stepped boxes gave way, and claimant fell, injuring her low back. She testified she has pain in her low back that goes down her right leg to her knee.

The next morning, claimant went to see Dr. Boehr, a chiropractor. However, later that day, she was sent by respondent to see Dr. Mead at St. Francis Hospital. Dr. Mead treated claimant with physical therapy. He offered epidural steroid injections, but claimant declined. Dr. Mead referred claimant to Dr. Smith, an orthopedist. Dr. Smith ordered an MRI, which showed claimant had a degenerative disc bulge at L5-S1. Dr. Smith discussed surgery with claimant, but she was and is still not interested in having surgery.

Claimant testified that she was off work for several weeks and then returned to respondent at light duty, which she said consisted of sitting in the break room reading manuals. On May 2, 2009, respondent closed down, and she lost her job. She has not worked since.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on September 8, 2009, at the request of claimant's attorney. Claimant provided him with a history of her accident and treatment, and he reviewed her medical records and performed a physical examination. Based on Dr. Prostic's examination of claimant and her history, he believed she has a soft tissue injury and recommended she have conservative care, including intermittent heat or ice massage, over-the-counter medication, and a therapeutic

exercise program. He also said it would be reasonable to try a steroid injection in the trochanter bursa.

Claimant told Dr. Prostic that she had a previous low back injury from a motor vehicle accident years earlier but that she had become asymptomatic. Dr. Prostic opined that claimant's accident of March 2, 2009, aggravated her preexisting degenerative disease, predominantly at L5-S1. Based on the AMA *Guides*,[1] Dr. Prostic rated claimant as having a 12 percent permanent partial impairment to the whole body.

Dr. Prostic said claimant should avoid frequent bending or twisting at the waist, forceful pushing or pulling, and more than minimal use of vibrating equipment or captive positioning. She is in the light medium category, meaning she should not lift over 35 pounds. He reviewed a task list prepared by Dick Santner. Of the 13 tasks on that list, Dr. Prostic concluded that claimant would be unable to perform 7 for a 54 percent task loss.

Dr. Prostic said that when he indicated on the task list that claimant was unable to perform a task, it was advice rather than a command because claimant was not his patient and he does not have the ability to command her to do or not do something. If claimant were to tell Dr. Prostic she wanted to perform a job where she would have to lift more than 35 pounds, he would tell her she needs to work out and improve her conditioning before attempting to do so. When asked if claimant has the physical capacity to perform each of the tasks for which he said she could not perform, Dr. Prostic answered: "It's all in a show of how much discomfort she's willing to tolerate. . . . If she can tolerate the pain, she can do it."[2] Dr. Prostic further testified: "On the day that I examined her, I don't think she could do constant sitting or constant standing or lifting greater than 35 pounds occasionally."[3] He did not think claimant could lift 50 pounds because she was deconditioned. Regarding tasks Nos. 1 and 2, Dr. Prostic said claimant could not perform those tasks because she was likely to sustain a new injury to her spine. The other tasks that he said claimant could not perform required constant sitting or standing, and he thought it likely that it would aggravate claimant's symptoms and cause her to have days off of work.

Dr. John Gilbert, a board certified orthopedic surgeon who is also a board certified independent medical examiner, examined claimant on September 15, 2009, at the request of respondent. After taking a history, reviewing her medical records, and performing a physical examination, he diagnosed her with an acute lumbar sprain superimposed on degenerative disc disease, a nonspecific term for a soft tissue injury to the lower lumbar spine.

---

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[2] Prostic Depo. at 35.

[3] Prostic Depo. at 35.

Based on the AMA *Guides*, Dr. Gilbert rated claimant as being in diagnosis related estimate Lumbosacral Category II, a 5 percent permanent partial impairment to the body as a whole. Given claimant's age, sex, and medical conditions, Dr. Gilbert believed she should work in the light to medium category with occasional lifting of 35 pounds, frequent lifting of 15 pounds, and constant lifting of 7 pounds. Dr. Gilbert reviewed Mr. Santner's task list. Of the 13 tasks on the list, he opined that claimant would be unable to perform 2 for a 15 percent task loss. Dr. Gilbert testified that the restrictions he imposed on claimant would fall under the category of recommendations, advice or suggestions. In regard to task No. 1, which Dr. Gilbert indicated claimant could not perform, he stated that he did not believe she is capable of constant lifting of 50 pounds or overhead lifting of 50 pounds. Regarding task No. 4, which Dr. Gilbert also indicated claimant could not perform, he said it requires occasional lifting of 50 pounds but no overhead lifting, and he considered the task to be in a gray zone and was possibly within her ability to perform.

Dick Santner, a vocational rehabilitation counselor, met with claimant on August 25, 2009, at the request of claimant's attorney. He prepared a list of 13 tasks claimant performed in the 15-year period before March 2, 2009. Claimant told Mr. Santner that the first time she performed the task she was doing when she was injured, receiving and unloading trailers with full cases of shoes, was on the day she was injured.

Regarding task Nos. 6 and 7, Mr. Santner indicates claimant does constant standing. In so saying, he testified he meant she is predominantly standing or standing for more than 2/3s of the time in one place. In those tasks, she would be moving her feet a little bit, as she is not in a locked position, but she would not walk. On task No. 11, which refers to occasional standing and walking, claimant would stand and walk less than a third of the time. Task Nos.12 and 13, which involve constant sitting the entire day, Mr. Santner explained that claimant would be sitting while performing the activity but not the entire day, as she would have breaks where she could get up and stretch.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510(e) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

K.S.A. 44-510e(a) defines task loss as "the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident . . . ." It has been generally accepted in workers compensation that the loss of ability means the claimant is unable to perform the task within the restrictions recommended by a physician because of the injury.[4] Work disability (wage and task loss) is intended, in part, to replace wages.[5] It is unlikely that an employer would knowingly hire a worker to perform a job with required tasks that exceed a worker's restrictions.[6] Respondent argues restrictions that are intended to merely avoid pain and discomfort and the possibility of future injury or re-injury should be disregarded because these are only possible consequences and are not synonymous with ability. Respondent would have the Board adopt a more narrow definition and hold that ability should be defined to only exclude those tasks which a claimant can no longer physically perform due

---

[4] See, *e.g.*, *Gutierrez v. Dold Foods, Inc.*, 40 Kan. App. 2d 1135, 199 P.3d 798 (2009); *Stephen v. Phillips County*, 38 Kan. App. 2d 988, 174 P.3d 452, *rev. denied* 286 Kan. __ (2008); *Edwards v. Boeing Co.*, 37 Kan. App. 2d 469, 154 P.3d 532, *rev. denied* 284 Kan. __ (2007); *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005); *Sharp v. Custom Campers, Inc.*, 31 Kan. App. 2d 772, 74 P.3d 42 (2003); *Haywood v. Cessna Aircraft Co.*, 31 Kan. App. 2d 934, 79 P.3d 179 (2002); *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001); *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000); *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[5] See *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 886 (1999).

[6] *Blythe v. State Highway Comm.*, 148 Kan. 598, 601, 83 P.2d 678 (1938); *Stephens v. Phillips County*, 38 Kan. App. 2d at 990.

to the injury, irrespective of any physician's restrictions and regardless of the consequences. Unlike K.S.A. 44-510d, the scheduled injury statute, K.S.A. 44-510e provides a method of compensation for loss of income and loss of ability to earn wages (work disability), with the percentage of functional impairment being the floor or minimum when the wage loss does not exceed 10 percent of the preinjury average weekly wage. Although it is interpreting a prior version of K.S.A. 44-510e, *McLaughlin*[7] is instructive as to the difference between functional impairment and work disability.

> "Functional disability is the loss of a part of the total physiological capabilities of the human body." *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 195, 558 P.2d 146 (1976). Work disability, on the other hand, is "that portion of the job requirements that a workman is unable to perform by reason of an injury." 221 Kan. at 195.[8]

Similarly, in *Hanson*,[9] the Court of Appeals makes a clear distinction between impairment and disability. "Once the claimant shows increased disability, compensation is for the full amount of disability less any amount of preexisting impairment established by the respondent."[10]

The Board, in keeping with established precedent and the plain meaning of the statute, finds that a claimant loses the ability to perform a work task when a credible physician opines that the work task cannot be performed within the restrictions imposed for the work-related injury.

In the opinion of Dr. Prostic, claimant has lost the ability to perform 7 out of the 13 tasks she performed in her 15 years of working before this accident. This equates to a 54 percent task loss. In the opinion of Dr. Gilbert, claimant lost the ability to perform 2 out of the 13 tasks for a 15 percent task loss. The ALJ considered both opinions, found them both to be credible, and adopted an average of the two opinions as claimant's task loss. The Board agrees that claimant's task loss lies within the range expressed by the two medical experts and affirms the ALJ's finding of a 34 percent task loss.

This Board also finds the impairment of function opinions of Drs. Gilbert and Prostic are equally credible, and the Board will average the two to find claimant's functional impairment is 8.5 percent.

---

[7] *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 44, 783 P.2d 348, *rev. denied* 245 Kan. 784 (1989).

[8] *Id.* at 46.

[9] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

[10] *Id.* at 96.

CONCLUSION

Claimant has met her burden of proving she suffered a loss of ability to perform 34 percent of the work tasks she performed during the relevant 15-year period before her accident. When averaged with her wage loss of 100 percent, claimant's permanent partial disability is 67 percent. Claimant's permanent impairment of function is 8.5 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that Administrative Law Judge Rebecca A. Sanders' Corrected Award dated April 12, 2010, is modified to find claimant sustained a 8.5 percent impairment of function but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2010.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: George H. Pearson, III, Attorney for Claimant
James C. Wright, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge